No. 412, 138
In the
Supreme Court of the United States.
Filed Oct. 15, 1898.
Supreme Court U. S.
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CLERK.

OCTOBER TERM, 1898.

R. E. DAGGS,
A. J. DAGGS,
APPELLANTS,
vs.
THE PHOENIX NATIONAL BANK,
APPELLEE.

No. 412

Appeal from the Supreme Court of the Territory of Arizona.

Answer to Motion to Vacate Supersedeas Bond or for Additional Security.

A. J. EDWARDS,
Attorney for Appellants.

PHOENIX, ARIZONA:
HERALD ELECTRIC JOB PRINT.
1898.

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R. E. DAGGS,
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APPELLANTS,
vs.
PHOENIX NATIONAL BANK,
APPELLEE.

No.

ANSWER TO MOTION OF APPELLEES TO VACATE SUPERSEDEAS BOND OR FOR ADDITIONAL SECURITY.

STATEMENT.

This action grew out of the foreclosure of a mortgage, which, with interest and cost, amounted to about $12,000, to which defendant plead in bar to the recovery of interest and also interposed a counter claim of more than $13,000, with a plea of failure of a part of the consideration of said notes and mortgage amounting to some $8,000. Judgment was rendered by the District Court, ignoring the entire defence of appellants and was afterwards affirmed by the Supreme Court of Arizona.

Upon investigation, from a legal standpoint, we find no substance in appellees' contention, and the only point that we feel called on to meet is appellees' charge of fraud, which we are constrained to say that appellees

have sought to prove by the grossest deceptive means and false affidavits. We shall take up each point or bit of evidence separate in its order, as it appears in the printed motion of appellees.

Appellees complain that we applied to the Honorable Joseph McKinna, justice of this court, and represented that the Chief Justice of Arizona had refused to act. In answer to this we submit the papers presented to His Honor Judge Street, together with the affidavit of A. J. Daggs, who presented them, as follows:

APPEAL AND ALLOWANCE.

The above named defendants, A. J. Daggs and R. E. Daggs, appellants, conceiving themselves aggrieved by the order and judgement entered on April 16th, A. D. 1898, affirming the judgment of the District Court of Maricopa County, Arizona, rendered and entered on the 12th day of November, A. D., 1896, for the principal sum of nine thousand seven hundred and forty-one and seventy-three hundredths ($9,741.73) dollars; and for interest on same to date of judgment, the sum of one thousand nine hundred and seventy-seven and ninety-seven hundredths ($1977.97) dollars, and for attorney's fees, the sum of two hundred and thirty-four and thirty-nine hundredths ($234.39) dollars, and for costs and disbursements the sum of ninety-eight and eighty-five hundredths ($98.85) dollars; making in all the sum of twelve thousand and fifty-two and ninety-four hundredths ($12,052.94) dollars. And that the said sum of nine thousand seven hundred and forty-one and seventy-three hundreths ($9741.73) dollars bears interest from date thereof at the rate of ten per cent. per annum; and that the said sum of two thousand three hundred and eleven and twenty-one hundreths ($2311.21) dollars bears interest from

date hereof at the rate of seven per cent. per annum, and with a foreclosure of plaintiffs' mortgage lien upon the lands and water rights covered by the said mortgage as it existed on the 28th day of November, A. D. 1894, in the above entitled proceedings, doth hereby appeal from said order to the Supreme Court of the United States; and they pray that this, their appeal, may be allowed; and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

A. J. DAGGS,
Atty. for Defendants, Appellants,
A. J. Daggs and R. E. Daggs,
Phoenix, Arizona.

PHOENIX, ARIZONA TERRITORY,
April 23d, A. D. 1898.

And now, to wit: On April A. D. 1898; it is ordered that the appeal be allowed as prayed for.

Chief Justice Supreme Court of Arizona.

IN THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

TERRITORY OF ARIZONA, } ss.
County of Maricopa. }

A. J. Daggs, being first duly sworn, upon his oath deposes and says that he is one of the appellants in the above entitled action, that the amount in dispute in said cause is the sum of Nine Thousand Seven Hundred Forty-one dollars and seventy-three cents ($9741.73), that the same is for the foreclosure of a mortgage, covering more than Fifty Thousand Dollars' worth of real estate, located and situated in Maricopa county, Arizona. That the said case further involved the right of a national bank

to charge, receive and collect a rate of interest exceeding the sum of seven per cent as provided by the revised statutes of the United States, Par. 5197, 5198, there being no rate of interest fixed by the law in the Territory of Arizona.

A. J. DAGGS.

Subscribed and sworn to before me this ..... day of April, A. D. 1898.

A. J. EDWARDS,
Notary Public.

My commission expires March 4th, 1900.

CITATION.

UNITED STATES OF AMERICA, *ss*

THE PRESIDENT OF THE UNITED STATES.

To the Phoenix National Bank, a corporation, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October, A. D. 1898, pursuant to an appeal filed in the clerk's office of the Supreme Court of the Territory of Arizona, wherein A. J. Daggs and R. E. Daggs are appellants and you are respondent, to show cause, if any there be, why the said judgment rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this the day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

Chief Justice of the Supreme Court of Arizona.

PROOF OF SERVICE OF CITATION.

On this day of , in the year of our Lord one thousand eight hundred and ninety-eight, personally appeared before me, the subscriber, and makes oath that he delivered a true copy of the within citation to

Sworn to and subscribed the day of A. D. 18

SUPERSEDEAS.

Territory of Arizona, ss:

Having considered the appellants' petition for an allowance of an appeal to the Supreme Court of the United States, I hereby certify that the Supreme Court of the Territory of Arizona is the highest court of law or equity in this Territory in which a decision in said case could be had, and that in my opinion there is involved in said case a Federal question, and it appearing by affidavit before me, that the amount involved in said case is more than the sum of five thousand ($5000) dollars, and that said case, being for the foreclosure of a mortgage lien, upon ample and sufficient property to satisfy the judgment, and all costs, and that the said property necessarily follows the suit, and said appeal having been allowed, as prayed for in said allowance of appeal, it is ordered, upon the filing of a supersedeas bond in the sum of , the same to be approved by the undersigned, all proceedings shall be stayed until the proceedings on said allowance of appeal in said cause shall be determined by

the Supreme Court of the United States. Said bond is furthermore now submitted and duly approved.

Chief Justice Supreme Court of Arizona.

APPEAL BOND TO SUPREME COURT U. S.

Know all men by these presents.

That we, A. J. Daggs and R. E. Daggs, as principals, and , as sureties, are held and firmly bound unto the Phoenix National Bank, a corporation, respondent in the full and just sum of , to be paid to the said Phoenix National Bank, a corporation, or its assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated the day of April, in the year of our Lord, one thousand eight hundred and ninety-eight.

Whereas, lately at a session of the Supreme Court of the Territory of Arizona, in a suit pending in said court, between A. J. Daggs and R. E. Daggs, and the Phoenix National Bank, a corporation, a final judgment of affirmance was rendered and entered against the said A. J. Daggs, and R. E. Daggs, and the said A. J. Daggs, and R. E. Dagg, having obtained an allowance of appeal, and filed a copy thereof in the Clerk's office of the said Supreme Court of the Territory of Arizona, to reverse the said judgment, in the aforesaid suit, and a citation directed to the said Phoenix National Bank, a corporation, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, on the day of , A. D. 1898.

Now, the condition of the above obligation is such,

that if the said A. J. Daggs, and R. E. Daggs shall prosecute said allowance of appeal to effect, and answer all damages and costs, it they fail to make their said appeal good, then this obligation shall be void, otherwise, the same shall be and remain in full force and virtue.

_____

_____

_____

The above and foregoing bond is this day approved by me, this the day of April, A. D. 1898.

_____

Chief Justice of the Supreme Court of Arizona.

A. J. Daggs, being duly sworn, says: That he presented the above papers to Webster Street, Chief Justice of Arizona, and ask that they be allowed and fixed:

1—Application for Allowance of Appeal.

2—Citation.

3—Affidavit of Value.

4—Supersedeas.

5—Blank Bond for amount to be fixed.

Very soon thereafter all of said papers were returned to me with the allowance of appeal scratched and garbled, as the originals appear on file in this court, and that these are the only papers ever presented by me or any one else in this case to said Street.

That I am the attorney for Wm. M. Billups in case No. 2362 of Wm. M. Billups vs. Utah Irrrigating Canal Co., as appears in the District Court docket of Maricopa county, Arizona, out of which case the $256.25 judgment arose, as is made to appear on page 10 of appellees' motion; that said judgment is for costs in the District

Court; that said case was by Wm. M. Billups appealed to the Supreme Court of Arizona, and is now on file undetermined in Supreme Court; that a supersedeas bond was given and is now on file in the case; that the real estate and personal property pledged to the Phoenix National Bank and under their mortgage is worth at a fair valuation at least fifty thousand dollars.

A. J. DAGGS.

Subscribed and sworn to before me by A. J. Daggs this 8th day of October, A. D. 1898.

R. E. DAGGS,
Notary Public.

My commission expires April 8, A. D. 1902.

Which shows conclusively that no appeal was allowed, no citition signed and *we re-iterate that our application was refused.* It is a singular coincident indeed that a litigant should spend several hundred dollars to apply for and get an appeal allowed at Washington, D. C., when it was already allowed at his own door without cost, besides it is our legal right to have an appeal allowed on application by any Justice of the Supreme Court of Arizona or any justice of this court, so held by this court in

Brown vs McConnell, 124, U. S. 489.

As to the certificate of the clerk on page 4 of appellee's printed motion and brief he is evidently mistaken as to the date when the papers were first presented, meaning June instead of May, as the appeal was not allowed until June the 6th, at Washington, D. C., on which date, June 6th, 1898, we presented our petition for allowance of appeal supersedes citation and *the bond approved in this case.* We presented this bond in the sum of $4,000, presented affidavits showing the value of the mortgaged property, together with the affidavit of the surety Billups as to his financial responsibility, which affidavit is as follows:

TERRITORY OF ARIZONA, } ss
County of Maricopa, }

Wm. M. Billups, being duly sworn, on oath says, that he is a resident householder of Maricopa county, Arizona, and the person who signed the supersedeas bond in appeal in this case; that he owns in his own right, situated in this county and territory, the following real estate, to wit: The N. E. ¼ and N. E. ¼ of the N. W. ¼ and N. W. ½ of the S. E. ¼ of section 10, township 1 north, five east, in all 240 acres, under high state of cultivation and reasonably worth $50 per acre, or $12,000; said land is free from incumbrance; also a brick house and two lots on Washington street, Phoenix, reasonably worth $4,000 and free from incumbrance; also the south ½ of N. E. ¼ of the S. W. ¼ section three, township one south, range five east, Maricopa county, Arizona, in all 20 acres, reasonably worth $30 per acre; total $600, free from incumbrance; also the north ½ of section 19, township one south, range five east, in all 320 acres, Maricopa county, Arizona, reasonably worth the sum of $30 per acre, total $9,600; also a stock of 27 head of horses, consisting of mares, colts, stallions, mostly standard bred, balance high grade trotting stock, worth at a reasonable valuation $100 per head, or a total of $2,700. Also farming implements sufficient to farm said land, also property in California, consisting of real estate and corporation stocks of the reasonable value of $5000, also some outstanding claims.

Deponent's entire indebtedness outstanding does not exceed the sum of $2,000, the total value of all deponent's property is reasonably worth the sum of $33,900.

Deponent is a married man, with wife and one child.

WM. M. BILLUPS.

Subscribed and sworn to before me this 25th day of May, 1898.

R. E. DAGGS,
Notary Public.

My commission expires April 8, 1902.

The honerable justice who approved the bond accepted the said bond as to amount but required more proof as to the financial responsibility of the surety and on the 17th day of June we sent the following two telegrams:

Received at Post Office Department, June 17, 1888.
Dated: Phoenix, Arizona, 17.

To Hon Joseph McKenna, care of D. A. McKnight, 501 F. street:

We consider Wm. M. Billups responsible for four thousand dollars. Has property here estimated over twenty-five thousand dollars.

WM. CHRISTY, President Valley Bank.

Received at Post Office Department, June 17, 1898.
Dated: Phoenix, Arizona.

To D. A. McKnight, 501 F. Street:

Billups perfectly responsible four thousand dollars, large property owner here.

THE LONDON CO.
Per J. A. DINES, Treasurer.

Thereafter His Honor Justice McKenna approved said bond and signed the supersedeas. The date of the bond and Justice McKenna will bear us out in this, we being aware of the decisions of this court, holding that the action of the Justice who approved the bond would not be reviewed, and having overlooked the note in the corner of the letter from the attorney who presented the application, that His Honor Justice McKenna desired the telegrams filed with the bond, and for the sole purpose of

saving as much expense of transcripting and printing as possible, we did not file the telegrams, as requested, and hence countered the wish of His Honor Justice McKenna, for which we are truly sorry, indeed, but clearly overlooked the note in the corner of the letter referred to above until this motion was served on us, calling attention to the fact, and on further examination of the letter. The telegrams will show for themselves. We still maintain that these telegrams are correct. The telegram by the London company's treasurer is not questioned, but the other, by Mr. Christy, is put in question by the man who sent it by affidavit. The question is raised whether A. J. Daggs presented a correct list of the Billups property and made a correct statement of its conditions to Mr. Christy, appellee, has cunningly avoided anything to show what this list was, or what it contained. We herewith present the same list, with the affidavit of A. J. Daggs.

A. J. Daggs being duly sworn, deposes and says that the same list of property shown Wm. Christy by affiant as the property owned by Wm. M. Billups is as follows:

240 acres Sec. 10; 2 lots and brick house in Phoenix, 20 acres Sec. 3 unincumbered; 320 acres Sec. 19, incumbered by Phoenix National Bank mortgage; seven water rights in the old UtahCanal proper; 27 head of standard horses.

That he denies ever making the statement that all of Wm. M. Billups' property was free from encumberance.

That Wm. Christy never ask affiant if Wm. M. Billups' property was encumbered, but Mr. Christy did ask how much Mr. Billups owed and that affiant informed said Christy that $2,000 would cover all that Mr. Billups owed, both direct and contingent.

That deponent told Mr. Christy expressly that one piece, the 320 described as the north ½ of Sec. 19, Twp.

1 South, range 5 East, on page 8 of respondent's motion was encumbered by respondent's mortgage but that the 240 acre tract, the 20 acres, the two lots and brick residence in Phoenix, his seven water rights in the old Utah Canal proper and his 27 head of standard horses, machinery, etc., were not encumbered.

That he told Wm. Christy that Mr. Billups had 25 or 30 thousand dollars worth of property in this county and a lot of property at Colusa, California, where he used to live. Whereupon Colonel Christy wrote the telegram referred to and set out in his affidavit and handed it to affiant and affiant wired it to Justice McKenna.

(Signed) A. J. DAGGS.

Subscribed and sworn to before me this 8th day of October 1898.

R. E. DAGGS,
Notary Public.

My commission expires April 8, 1902.

We deny that we said to Christy that all of Mr. Billups' property was free from incumbrance. We now reiterate that Mr. Billups has 260 acres of land, 27 horses, residence and two lots in Phoenix, and seven water rights, free from incumbrance, outside of the 320 acres subject to the mortgage of appellee; and as appellee has more than $40,000 worth of other property under this mortgage, Mr. Billups has the right to compel them to marshall assets and sell the other property first, which will leave this 320 acres in a condition to be considered practically free from incumbrance. Mr. Christy says he has been shown an abstract and that all Mr. Billups' property is *seriously incumbered*, and appellee follows this affidavit with what purports to be the abstract, which shows on its face that it is not an abstract and only a grossly inaccurate statement, and leaves out nearly one-half of Mr.

Billups' land, in fact, shows on its face that it was made for the occasion and, perhaps, to show Mr. Christy.

Let us see if Billups' property is seriously incumbered, according to appellee's own statement. Take the tax list affixed it gives Mr. Billups $5,219, without the 320 acres of land covered by appellee's mortgage (which surely Billups does not owe.) Appellee's own purported abstract shows liens by judgment of $332.25, $5,210—$332.25=$4,877.75, besides the second item on the assessor's list shows that he has only valued 20 acres of land, when he should have valued 40 acres. So add $275 to that valuation and, according to his own valuation, Billups has $5,955 over this "*serious incumbrance*"

It will be noted that this so called abstract gives the balance due on the first judgment noted as $76.45 on May 25, 1897. This being 17 months afterwards, this is for the purpose of creating the impression that it is due now, when the same has long since been settled. The other $256.25 judgment we show has been appealed, and supersedeas bond given and is now pending before the Supreme Court of Arizona; but this so called abstract fails to reveal that fact to this court.

See the affidavit of A. J. Daggs above.

The assessor certifies that this property is assessed at its cash value, and appellee puts great stress on this value. It only remains to see what the assessor means by cash value. See certificate furnished us by the assessor, as follows:

TERRITORY OF ARIZONA, } *ss.*
County of Maricopa. }

I, Frank Luke, do hereby certify that I am County Assessor of Maricopa County, Arizona, and in making valuations on property assessed in Maricopa County the laws of Arizona require me to assess property at its cash value; under my construction of the laws I value property

at what in my judgment the property would sell for under forced sale on execution without regard to its true or commercial value.

I further certify that C. H. Hakes, Deputy Assessor, assessed the property of Wm. M. Billups for the year 1898.

In witness whereof I have hereunto set my hand this 21st day of September, 1898.

FRANK LUKE,
Assessor.

Besides, the assessor certifies that Mr. Hakes assessed Mr. Billups this year, and if we sell Mr. Billups out under forced sale, he has over $5,000, according to the proof of appellee.

Next take the tax sales for instance. This *so called abstract* does not show to whom these sales were made; the reason of this is, if it had it would have shown that they create no lien on the property. The sale of 1890, certificate No. 77, was before the land was entered, hence a tax on government land. See letter of government land agent of Tucson.

TUCSON, ARIZONA,
September 29, 1898.

MR. R. E. DAGGS,
Phoenix, Arizona.

SIR.—In reply to your favor of the 28th I have to say that final proof was made by W. A. Daggs for the N. E. ¼ of Sec. 19, Twp. 1 S, R. 5 E, on July 24, 1892, and of course final receipt bears that date.

Very respectfully,
JOHN H. BAUMAN,
Receiver.

Hence a nullity, but this abstract does not show it. Certificate No. 96, year 1894, was sold to the owner, R.

E. Daggs. See affidavit of R. E. Daggs and certificate D. L. Murray, as follows.

R. E. Daggs being duly sworn, deposes and says that he was the owner of the North ½ of Sec 19, Twp 1, South, Range 5 East, when tax certificate No. 96 was issued, and that he purchased the certificate himself and had it issued to himself to protect the property.

That tax certificates No. 391 and 393 were purchased by L. H. Chalmers, attorney for the Phoenix National Bank, the mortgagees, at the request of appellants to protect the property and that all of said certificates were and are now in the possession of appellee.

R. E. DAGGS.

Subscribed and sworn to before me this the 8th day of October, 1898.

WM. A. HANCOCK,
Notary Public.

My commission expires October 13th, 1900.

PHOENIX, A. T., September 26, 1898.

I, D. L. Murray, treasurer and tax collector of Maricopa County, Arizona, do hereby certify that the property embraced in Tax Certificate No. 96, year 1894, was sold to R. E. Daggs, that the property embraced in Tax Certificate No. 391, year 1896, and No. 343, year 1897, was sold to L. H. Chalmers.

D. L. MURRAY,
Treasurer and Tax Collector.

Hence no lien. This fact was well known to the appellee but is withheld from the court. Certificates No. 391 and 341 were purchased at our request by Attorney Chalmers for the Phoenix National Bank (see certificate of Murray above), he being the attorney for the mortgagee, see his affidavit on page 15 of Appellee's Brief and Mo

tion. All this appellee well knew but so constructed the proof and so called abstract that it would not appear. Certificates No. 38 and 39 for the year 1893 were issued before the appellee's mortgage and are in the hands of appellee at this time. The next to call our attention is the affidavit of Expert Jerry Millay who swears that "*in his opinion* nothing could be collected by execution from Wm. M. Billups" and that *he does* not consider Billups good for any amount on any bond. The extreme utterance of this affidavit shows the utter flagrancy of this deponent in the face of the proof offered by appellee. The so-called abstractors certificate and the assessor's list showing more than $7,000 values, and the fact that appellee only claims that Billups is not sufficient security for this amount, yet Millay swears that *in his opinion* nothing could be collected from Billups on execution. The assessor certifies that Billups' property would sell for $7,770 on execution and does not assess his water stock as the canal and not the stock is assessable. The next we find is the affidavit of Mr. Chalmers. We agree with Mr. Chalmers exactly and have selected men who know specifically the values in these localities. The next after Mr. Chalmers' affidavit comes the argument of the learned counsel for appellee. We will only refer to this for the purpose of correcting some (we hope) unintentional mistakes or omissions. The first point, appellee ask the court to raise the bond to $10,000 without showing any necessity therefor or any proof that the mortgaged property is not ample, when we assert that the property covered by the mortgage as first lien is worth more than $50,000. Appellees offer the certificate of Chief Justice Street showing that he fixed the bond at $10,000 without proof that he acted correctly and asks this court not to review the evidence and action of his honor, Justice McKenna, but to set aside the action of Judge McKenna,

not as incorrect but because Judge Street says he fixed the bond at $10,000. If we had not of tendered a $4,000 bond and consider that Justice McKenna acted properly, we would insist that $1,000 would be ample in this case but having tendered $4,000 in order to save any possible delay as our time was growing short to get a supersedeas we will not ask a reduction. This court has however repeatedly held that it would not review the action of a a justice of this court in accepting bonds, see

Jerome vs. McCorter, 21 Wall,
Page 17. The leading case on the point.

Counsel next says the proof shows that the only real property owned by the surety, Billups, is 40 acres on section 10. The appellee's proof shows that Billups owns 240 acres on section 10, which is correct, and this 40 acres is a part, and is valued as 20 acres at $275; this should be doubled to $550. The next is lots 2 and 3 in Block 14, Collins Addition to the City of Phoenix, which the assessor does say are worth $220 sold under forced sale. The assessor also says these two lots have $1,200 improvements. This $1,200 the learned counsel has overlooked. The next is the N. ½ of section 19 which appellee says is subject to the mortgage sought to be foreclosed in this case. This we admit. We have heretofore commented on this property. The 20 acre tract on section 3 was subject to a tax sale and deed, but that was caused by double assessment, and is cleared by the quit claim deed of James, as follows:

(Copy quit claim deed of James.)

We deny that the proof of appellee sustains his contention We submit the following further proof in addition to what we already have:

W. A. Daggs being duly sworn says that he is a farmer

and stock raiser by occupation and lives on lands under the old Utah ditch proper.

That he is well acquainted with the values of land under the different canals in Maricopa county, Arizona, and was the president of the old Utah canal proper for a long term of years, and is well acquainted with the values of land and water under the old Utah canal proper and lives on a farm adjoining the ranch of about 240 acres known as the Wm. M. Billups ranch and his seven shares of old Utah water. Said land is described as follows:

The N. E. ¼ of Sec. 10, Tp. 1 north, R. 5 east and N. E. ¼ of the N. W. ¼ of Sec. 10, Tp. 1 north, R. 5 E., and N. W. ¼ of S. E. ¼ Sec. 10, Tp. 1 north, R. 5 east, all in Maricopa county, Arizona Territory, and that he is one of Wm. M. Billups' grantors and knows that Wm. M. Billups is now occupying and cultivating said ranch, and states that said ranch is in a high state of cultivation, in alfalfa, vines, pears, peaches and other fruits, and that in affiant's opinion such lands are worth, at a fair valuation, $60 per acre at this time. This valuation includes the seven Old Utah water shares, worth separate from the land, at this time $4000.

That he is also acquainted with the S. ½ of the N. E. ¼ of Sec. 3, Tp. 1 south, R. 5 east, belonging to Wm. M. Billups, and that it is reasonably worth $35 per acre, that it is situated under two canals.

That he is also acquainted with the N. ½ of Sec. 19, Tp. 1 south, Range 5 east, Salt River base and meridian, Maricopa County, Arizona Territory, owned by Wm. M. Billups, and knows from sales of other lands adjacent thereto that said land is worth fairly $30 to $35 per acre. That said lands can be reached by six canals, and is under cultivation for wheat and barley.

That he is well acquainted with the fine string of standard bred trotting horses, numbering some twenty-seven

head, belonging to Wm. M. Billups, and that they are worth at least over $125 per head.

That he knows Wm. M. Billups' residence property in Phoenix, Arizona. That such residence is located on Washington street, the principal business street, with electric car line passing in front of the door. That Wm. M. Billups has all conveniences to his said brick residence, and such property ought to be worth in the neighborhood of $5,000.

W. A. DAGGS.

Subscribed and sworn to before me this 4th day of October 1898.

R. E. DAGGS,
Notary Public.

My commission expires April 8, 1902.

That affidavit not only shows the value of the property of the surety Billups, but shows his qualifications to pass on its values as required by appellee's own proof (Mr. Chalmer's affidavit). This proof shows the total value to reach $33,075. The next we submit the affidavit of T. L. Schultz.

Col. T. L. Schultz being first duly sworn, deposes and says, that he has dealt in real estate in the Salt River Valley, Maricopa County, Arizona, for the last past fourteen years and is acquainted with lands under all the irrigating canals and the water stocks in each canal in said county and territory, and the values thereof. That he is well acquainted with Wm. M. Billups' ranch consisting of about 240 acres of land situated, lying and being the N. E. ¼, section 10, and the N. W. ¼ of the S. E. ¼ of section 10, township 1, N. R. 5 E., Gila and Salt River Base and Meridian, Maricopa County, Arizona. That such lands are under the old Utah Canal proper and now in alfalfa. That under that Canal the water shares

are very valuable for the reason that share owners, own the water, that the shares represent property, and are transferable like bank stock.

That such shares are well worth $500 per share having a priority of right over most other canals to draw water during scercity of water, and in connection with land, land and water are considered to be worth at least 40 Dollars per acre cash. Such land will yield in any fair season 30 bushels of wheat or 40 to 50 bushels of barley and from 5 to 6 tons of alfalfa hay per acre.

That he knows Wm. M. Billups owns a brick residence in Phoenix worth four or five thousand dollars, and other property and is one of the large property owners in the Salt River Valley and is considered to be responsible for any contract that he will make.

THEO. L. SCHULTZ.

Subscribed and sworn to before me by Col. T. L. Schultz this 30th day of Sep., A. D. 1898.

R. E. DAGGS,
Notary Public.

My commission expires Apri 8, A. D. 1902.

Which shows for itself that this witness estimates the 240 acres and residence value at $13,600.

The next affidavit we submit Mr. L. F. Kiggins.

L. F. Kiggins being duly sworn deposes and says, that he is a resident of Maricopa County, Arizona, and has been for the last past six or seven years. That he is acquainted with Wm. M. Billups personally and owns property adjoining his 240 acre ranch, and knows his 20 acre tract and his 320 acre tract, and in fact knows all his property, both real and personal, the value thereof, and that his 240 acre ranch is one of the finest in Salt River valley. That Mr. Billups has an abundance of water in the Old Utah canal proper and keeps this ranch in fine

condition. That it is worth, land and water, at least $50 per acre, cash.

That lands vary in value in Salt River valley, and Mr. Billups' other land is not worth so much; such lands are worth $30 to $35 per acre.

That Mr. Billups has seven shares of water in the Old Utah canal proper that will sell for cash $500 per share.

That Wm. M. Billups has a fine brick residence in Phoenix that he knows is worth four or five thousand dollars.

That Mr. Billups is considered here by every one who knows him at a careful business man and perfectly reliable, and responsible for any contract that he signs.

That Mr. Billups has a fine string of high bred trotting horses, but I am not posted in their value. Horse men say they are very valuable— worth $125 to $150 a head.

L. F. KIGGINS.

Subscribed and sworn to before me this 6th day of October, 1898.

R. E. DAGGS,
Notary Public.

My commission expires April 8, 1902.

This witness shows the surety, Billups, to be worth a total of $29,575, putting it at his lowest estimate. The surety's, Billups', affidavit states his circumstances very fairly, as shown above. His own estimate puts his property at a total of $33,900. Deduct from this $2,000 for debts, leaves a net value of $31,900. Millay says he could not make a cent off of Billups on execution.

Mr. Gill, Clerk of the District Court, has examined this surety *on oath* as to his financial responsibility and hence is thoroughly qualified to speak on the subject. The following is his certificate:

I, Edwin S. Gill do hereby certify that I am the Clerk

of the District Court of the Third Judicial District of the Territory of Arizona.

That I have examined Wm. M. Billups on his oath touching his qualifications as a surety on bonds, and I consider Wm. M. Billups a most excellent surety on a bond of Four Thousand Dollars.

EDWIN S. GILL,
Clerk District Court for 3d Judicial District.

ARGUMENT.

Appellee cites the case of R. R. Co. vs. Schutt to support them. That case supports appellants. In that case fraud was admitted. Where in the case at bar the charge of fraud is denied and we have submitted proof showing that the surety we offer is a most excellent surety for the bond we tendered and by the Hon. Justice accepted.

Outside of the showing made by appellants the showing made by appellee scarcely casts an inference against the sufficiency of the surety. They show he pays taxes on more than $5,000 worth of property which the assessor certifies is no measure of its true and commercial value. All know that an assessed value in Arizona is never more than one-fifth the value, so by appellee's own showing the surety must be worth over $25,000, and appellants show and prove that he has property worth more than $25,000.

The certificate of the Clerk of the District Court of the 3d Judicial District of Arizona is very significant. He approves all the bonds and qualifies all the sureties thereon in this court and he certifies that he has tested the surety, Billups, on oath before him and he considers Billups a most excellent surety for $4,000. We venture that the clerk of our court, whose official duty it is to accept sureties on bonds, is the most competent person to

pass on the qualification of persons offered as surety on bonds in this vicinity and his certificate to our mind is conclusive.

We have but one abstract company in Phoenix and they have never made an abstract of Mr. Billups' property. It would cost more than $100 to abstract his property. The cunning list shown Mr. Christy and from which Christy swears that all of Billups' property is seriously incumbered, is not an abstract. If appellee will go to the expense of $100 and furnish this court with an abstract of all of Billups' property, it will show him to have the property just as he swears he has.

To vacate the supersedeas in this case would enable the appellee to sacrifice this vast property at forced sale before our rights can be heard in this court and mulct us in further and needless litigation to protect ourselves.

Appellee asks for more security. We say that bonds are only required by this Court, in cases of this kind, where the property necessarily follows the suit, in an amount sufficient to cover "costs and just damages for delay."

Rule 29.
Jerome vs. McCorter, supra.
Kuntz vs. Omaha Hotel Co.
107 U. S., page 378.
Supervisors vs. Kinnicatt, 103 U. S., 554.
Omaha Hotel Co. vs. ———, 108 U. S., 911.

In this case appellees have a first lien on over $50,000 worth of property. They have a good bond now on file in this court for $4,000, with as good security as can be had, to cover costs and delay, all for a claim of $12,000. They ask for more—a $10,000 bond, or for additional security to the $4,000 bond.

Our showing heretofore is our answer to this request

and respectfully submit that their motion is without merit and should be denied.

A. J. EDWARDS,
Attorney for Appellants.